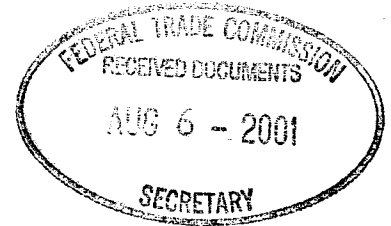


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
)
Schering-Plough Corporation,)
a corporation,)
)
Upsher-Smith Laboratories,)
a corporation,)
)
and)
)
American Home Products Corporation,)
A corporation.)

Docket No. 9297

PUBLIC VERSION

**RESPONDENT SCHERING-PLOUGH CORPORATION'S
OBJECTIONS AND RESPONSES TO COMPLAINT COUNSEL'S
FIRST REQUEST FOR ADMISSIONS**

Pursuant to Federal Trade Commission ("FTC") Rule of Practice Section 3.32, respondent Schering-Plough Corporation ("Schering") submits these objections and responses to Complaint Counsel's First Request for Admissions. Schering timely submits these responses and objections within the time frame agreed to by counsel.

GENERAL OBJECTIONS AND STATEMENT

Schering objects to Complaint Counsel's First Requests for Admissions to the extent that they seek to impose on Schering burdens or duties inconsistent with or in addition to those requested under the FTC's Rules of Practice. Schering further objects to the "Definitions" provided with these requests to the extent that they are vague or ambiguous and to the extent that they impose requirements beyond those imposed by the FTC's Rules of Practice.

The full text of each request is set forth below in italics, followed by Schering's objections and responses. Provision of a response to any request shall not constitute a

waiver of any applicable objection, privilege, or other right and, unless otherwise specifically stated, Schering denies each of Complaint Counsel's requests. In addition, the general objections set forth above are incorporated into each specific response below as if set forth fully therein. In those instances in which Schering responds by noting that it can neither admit nor deny the request, the information Schering currently possesses is inadequate to provide a more substantive response, and Schering is making reasonable inquiry with respect to such request. Finally, Schering notes that discovery is continuing and reserves the right to supplement these responses as necessary.

SPECIFIC OBJECTIONS AND REQUESTS

Request No. 1: *In 1997, Ian Troup was President and Chief Operating Officer of Upsher-Smith.*

Answer: Admitted upon information and belief.

Request No. 2: *In 1997, Raman Kapur was President of Warrick Pharmaceuticals, a subsidiary of Schering.*

Answer: Admitted in part. Schering admits that in 1997, Warrick Pharmaceuticals was a subsidiary of Schering. However, during 1997, Raman Kapur was President of Worldwide Generics for Schering.

Request No. 3: *In 1997, Martin Driscoll was Vice President of Marketing and Sales of the Key Pharmaceuticals Business Unit of Schering Laboratories, and Schering Laboratories was the United States pharmaceutical division of Schering.*

Answer: Admitted in part. Schering admits that in 1997, Martin Driscoll was Vice President of Marketing and Sales of the Key Pharmaceuticals Business Unit of Schering Laboratories. However, Schering Laboratories is a division of Schering-Plough Pharmaceuticals.

Request No. 4: *The first meeting in 1997 between representatives of Schering and Upsher-Smith during which representatives of Schering and Upsher-Smith discussed the possibility of settling the Schering/Upsher-Smith patent litigation was between Ian Troup and Martin Driscoll.*

Answer: Admitted in part. Schering admits that Ian Troup and Martin Driscoll met in 1997 to discuss the possibility of settling the case of Key Pharmaceuticals, Inc. v. Upsher-Smith Laboratories, Inc., Case No. 95-CV-6281 (WHW) (D.N.J.) ("Schering/Upsher patent litigation"). Schering can neither admit nor deny that the first meeting between representatives of Schering and Upsher-Smith Laboratories ("Upsher") to discuss the possibility of settling the Schering/Upsher patent litigation occurred in 1997 between Mr. Troup and Mr. Driscoll.

Request No. 5: *The first meeting between Ian Troup and Martin Driscoll during which they discussed the possibility of settling the Schering/Upsher-Smith patent litigation was held in Mr. Driscoll's office in the spring of 1997.*

Answer: Admitted.

Request No. 6: *The first meeting between Ian Troup and Martin Driscoll during which they discussed the possibility of settling the Schering/Upsher-Smith patent litigation was held in Mr. Driscoll's office on May 21, 1997.*

Answer: Schering admits that the first meeting between Ian Troup and Martin Driscoll during which they discussed the possibility of settling the Schering/Upsher-Smith patent litigation was held in Mr. Driscoll's office in the spring of 1997. However, after reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny that the meeting took place on May 21, 1997

Request No. 7: *On May 28, 1997, representatives of Schering and Upsher-Smith met at Upsher-Smith's offices in Plymouth, Minnesota.*

Answer: Admitted.

Request No. 8: *Martin Driscoll, Raman Kapur, and Ian Troup were present at a May 28, 1997, meeting at Upsher-Smith's offices in Plymouth, Minnesota.*

Answer: Admitted in part and denied in part. Schering admits that Mr. Driscoll, Mr. Kapur, and Mr. Troup were present at a May 28, 1997 meeting at Upsher's offices in Plymouth, Minnesota. Schering denies the request to the extent that it implies that no other persons were present, as Andrew Hirschberg, a consultant for Upsher, also attended the May 28, 1997 meeting.

Request No. 9: *At a May 28, 1997, meeting at Upsher-Smith's offices in Plymouth, Minnesota, the settlement of the Schering/Upsher-Smith patent litigation was discussed.*

Answer: Admitted.

Request No. 10: *On June 3, 1997, representatives of Schering and Upsher-Smith met at Upsher-Smith's offices in Plymouth, Minnesota.*

Answer: Admitted.

Request No. 11: *Martin Driscoll, Raman Kapur, and Ian Troup were present at a June 3, 1997, meeting at Upsher-Smith's offices in Plymouth, Minnesota.*

Answer: Admitted in part and denied in part. Schering admits that Mr. Driscoll, Mr. Kapur, and Mr. Troup were present at a June 3, 1997 meeting at Upsher's offices in Plymouth, Minnesota. Schering denies this request to the extent that it implies that no other persons were present, as at least Andrew Hirschberg also attended the June 3, 1997 meeting.

Request No. 12: *At a June 3, 1997, meeting at Upsher-Smith's offices in Plymouth, Minnesota, the settlement of the Schering/Upsher-Smith patent litigation was discussed.*

Answer: Admitted in part and denied in part. Schering admits that at a June 3, 1997 meeting at Upsher's offices in Plymouth, Minnesota, one topic of discussion was the settlement of the Schering/Upsher patent litigation. Specifically, the concept of splitting the patent life for K-Dur® was discussed by the parties at this meeting. Schering denies the request to the extent that it implies that no other issues were

discussed at this meeting, as Schering and Upsher also discussed particular products on which Schering and Upsher could collaborate in a licensing arrangement that could produce revenues for both Schering and Upsher.

Request No. 13: *In 1997, Jeffrey Wasserstein was Staff Vice President, Corporate Business Development, in the Corporate Business Development Department of Schering.*

Answer: Admitted.

Request No. 14: *On June 10, 1997, Jeffrey Wasserstein sent Ian Troup a draft confidentiality agreement in anticipation of a meeting to be held between representatives of Schering and representatives of Upsher-Smith.*

Answer: Schering admits that on June 10, 1997, Jeffrey Wasserstein had sent to Ian Troup, via facsimile, a signed confidentiality agreement in anticipation of a June 12, 1997 meeting to be held between representatives of Schering and representatives of Upsher to discuss the possibility of Upsher licensing its Niacor-SR product to Schering.

Request No. 15: *In 1997, John Hoffman was Staff Vice President and Associate General Counsel of Schering.*

Answer: Admitted.

Request No. 16: *On Thursday, June 12, 1997, representatives of Schering and Upsher-Smith met at a conference room at Schering's facilities in Kenilworth, New Jersey.*

Answer: Admitted.

Request No. 17: *Ian Troup, Andrew Hirschberg, Raman Kapur, John Hoffman, and Jeffrey Wasserstein were present at a June 12, 1997, meeting at a conference room at Schering's facilities in Kenilworth, New Jersey.*

Answer: Admitted in part and denied in part. Schering admits that Ian Troup, Andrew Hirschberg, John Hoffman, and Raman Kapur were present at a meeting on June 12, 1997, at a conference room in the law department of Schering's offices in Kenilworth, New Jersey. However, after reasonable inquiry, the information known to or

readily obtainable by Schering is insufficient to allow Schering to admit or deny that Jeffrey Wasserstein was present at that meeting. Schering denies the request's implication that no other persons were present at the meeting, as at least Nick Canella, an outside attorney for Upsher, also attended.

Request No. 18: *At a June 12, 1997, meeting at a conference room at Schering's facilities in Kenilworth, New Jersey, the settlement of the Schering/Upsher-Smith patent litigation was discussed.*

Answer: Admitted in part and denied in part. Schering admits that on June 12, 1997, at a conference room in the law department of Schering's offices in Kenilworth, New Jersey, the settlement of the Schering/Upsher patent litigation was discussed, and the decision to split the patent life for K-Dur® was agreed upon in principle at this time, and the September 1, 2001 date was agreed upon in principle at this time. However, Schering denies the request's implication that no other issues were discussed at this meeting. Also discussed at the meeting were potential Upsher products, including Niacor-SR, and perhaps including Prevalite, pentoxifylline, and selected potassium products, on which Schering and Upsher could collaborate in a licensing arrangement that could produce revenues for both Schering and Upsher.

Request No. 19: *Niacor-SR is the trade name of a sustained release niacin product that Upsher-Smith had under development in June of 1997.*

Answer: Admitted.

Request No. 20: *Representatives of Upsher-Smith brought information on Niacor-SR, to a June 12, 1997 meeting at a conference room at Schering's facilities in Kenilworth, New Jersey.*

Answer: Admitted in part. Schering admits that at the June 12, 1997 meeting between representatives of Upsher and Schering at a conference room in the law department of Schering's Kenilworth facilities, Ian Troup discussed Niacor-SR with the Schering representatives present, and that there is some indication that representatives of Upsher-Smith brought information on Niacor-SR to the meeting. However, after

reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny conclusively that Upsher's representatives brought documents relating to Niacor-SR to this meeting.

Request No. 21: *In 1997, Thomas Lauda was employed by Schering as Executive Vice President of Global Marketing, and as such was in charge of the Global Marketing organization within Schering.*

Answer: Schering admits that during some part of 1997, Thomas Lauda was Executive Vice President of Global Marketing for Schering. His responsibilities included the management of business development for Schering Laboratories and Schering International, the marketing aspects of new products, and the preparation of field operations in setting up new product launches for Schering's international and U.S. operations. During the first part of 1997, Mr. Lauda's title may have been Senior Vice President of Global Marketing.

Request No. 22: *On June 12, 1997, information on Niacor-SR was sent via facsimile from Warrick Pharmaceuticals to the Schering Global Marketing organization, including documents, copies of which bear the document identification numbers SP 16 00061 through SP 16 00112 and SP 16 00113 through SP 16 00140.*

Answer: Admitted in part. Schering admits that on June 12, 1997, the documents Bates stamped SP 16 00061 through SP 16 00112 were sent via facsimile by Warrick Pharmaceuticals to Schering's Global Marketing department. Schering also admits that the document Bates stamped and SP 16 00113 through SP 16 00140 was sent via facsimile by Warrick Pharmaceuticals on June 12, 1997. However, after reasonable inquiry, the information known to or readily obtainable by Schering is insufficient to allow Schering to admit or deny that the recipient of the facsimile transmission was the Schering Global Marketing department. From evidence available, however, Schering draws a strong inference that the recipient of the facsimile transmission was the Schering Global Marketing department

Request No. 23: *In 1997, James Audibert was Senior Director of Global Marketing of Cardiovascular and Central Nervous System Products in the Global Marketing organization within Schering.*

Answer: Admitted.

Request No. 24: *In 1997, James Audibert wrote a commercial assessment for Niacin, entitled "Niacor SR," a copy of which bears the document identification numbers SP 16 00041 - 00047.*

Answer: Schering admits that during 1997, James Audibert wrote a document entitled "Niacor-SR," which bears the Bates stamp numbers SP 16 00041 through SP 16 00047.

Request No. 25: *Among the information James Audibert relied on to perform his commercial assessment of Niacor-SR are documents, copies of which bear the document identification numbers SP 16 00061 through SP 16 00112.*

Answer: Schering admits that James Audibert used the documents Bates stamped SP 16 00061 through SP 16 00112 to prepare the document entitled "Niacor-SR," which bears the Bates stamp numbers SP 16 00041 through SP 16 00047.

Request No. 26: *James Audibert did not begin his assessment of Upsher-Smith's Niacor-SR until after he received documents, copies of which bear the document identification numbers SP 16 00061 through SP 16 00112.*

Answer: Admitted in part and denied in part. Mr. Audibert's assessment of Niacor-SR consisted of at least three segments: 1) gathering, reviewing and becoming knowledgeable about information related to the size of the market for cholesterol-reducing products; 2) gathering, reviewing and becoming knowledgeable about information related to sustained release niacin products, and; 3) gathering, reviewing and becoming knowledgeable about information related to Upsher's Niacor-SR product. Mr. Audibert had completed 1) and 2) above well before he received the documents Bates stamped SP 16 00061 through SP 16 00112. Upon information and belief, Schering admits that Mr. Audibert's evaluation specifically of Upsher's Niacor-SR product began after Mr. Audibert received the documents Bates stamped SP 16 00061 through SP 16 00112.

Request No. 27: *James Audibert did not begin his analysis of Upsher-Smith's Niacor-SR before June 12, 1997.*

Answer: Admitted in part and denied in part. Mr. Audibert's assessment of Niacor-SR consisted of at least three segments: 1) gathering, reviewing and becoming knowledgeable about information related to the size of the market for cholesterol-reducing products; 2) gathering, reviewing and becoming knowledgeable about information related to sustained release niacin products, and; 3) gathering, reviewing and becoming knowledgeable about information related to Upsher's Niacor-SR product. Mr. Audibert had completed 1) and 2) above well before he received the documents Bates stamped SP 16 00061 through SP 16 00112. Upon information and belief, Schering admits that Mr. Audibert's evaluation specifically of Upsher's Niacor-SR product began after Mr. Audibert received the documents Bates stamped SP 16 00061 through SP 16 00112.

Request No. 28: *In 1997, Paul Thompson was an attorney employed in the Schering Legal Department.*

Answer: Admitted.

Request No. 29: *On Monday, June 16, 1997, representatives of Schering and Upsher-Smith met at Upsher-Smith's headquarters in Plymouth, Minnesota.*

Answer: Admitted.

Request No. 30: *Ian Troup, Jeffrey Wasserstein, John Hoffman, Raman Kapur, and Paul Thompson were present at a June 16, 1997, meeting at Upsher-Smith's offices in Plymouth, Minnesota.*

Answer: Admitted in part and denied in part. Schering admits that Ian Troup, Jeffrey Wasserstein, John Hoffman, Raman Kapur, and Paul Thompson were present at a June 16, 1997, meeting at Upsher's offices in Plymouth, Minnesota. Schering denies the request's implication that no other persons were present at this meeting, as at least Nick Canella also attended on behalf of Upsher.

Request No. 31: *At a June 16, 1997, meeting at Upsher-Smith's offices in Plymouth, Minnesota, the settlement of the Schering/Upsher-Smith patent litigation was discussed.*

Answer: Admitted.

Request No. 32: *At a June 16, 1997, meeting in Plymouth, Minnesota, representatives of Schering and Upsher-Smith agreed, subject to the approval of the Schering Board of Directors, that Schering would pay Upsher-Smith \$60 million dollars, with additional payments from Schering to Upsher-Smith contingent on the regulatory approvals for Niacor-SR, and additional royalty payments from Schering to Upsher-Smith in contingent on Schering making sales of Niacor-SR.*

Answer: Denied. Schering's agreement to pay \$60 million in installments for licenses for Niacor-SR, Prevalite, pentoxifylline, and Klor-Con was not entered into on June 16, 1997.

Request No. 33: *At a June 16, 1997, meeting in Plymouth, Minnesota, representatives of Schering and Upsher-Smith agreed, subject to the approval of the Schering Board of Directors, that Schering would pay Upsher-Smith \$60 million dollars in a number of installments, but no agreement was reached on the amount of each installment.*

Answer: Denied. Schering's agreement to pay \$60 million in installments for licenses for Niacor-SR, Prevalite, pentoxifylline, and Klor-Con was not entered into on June 16, 1997.

Request No. 34: *After the June 16, 1997, meeting in Plymouth, Minnesota, Jeffrey Wasserstein, John Hoffman, and Paul Thompson, returned to their respective offices and continued to work into the night of June 16, 1997, on reaching agreement with Upsher-Smith on settling the Schering/Upsher-Smith patent litigation.*

Answer: Denied. The activities mentioned in Request No. 34 did not occur on June 16, 1997.

Request No. 35: *During the night of June 16 – June 17, 1997, negotiations continued between representatives of Schering and Upsher-Smith regarding settling the Schering/Upsher-Smith patent litigation.*

Answer: Denied. The activities mentioned in Request No. 35 did not occur on June 16, 1997.

Request No. 36: *Sometime during the night of June 16 – June 17, 1997, contingent on the subsequent approval of the Schering Board of Directors, representatives of Schering and Upsher-Smith agreed that Schering would pay \$60 million in installments to Upsher-Smith and also agreed on the timing and amount of the installments.*

Answer: Denied. The activities mentioned in Request No. 36 did not occur on June 16, 1997.

Request No. 37: *After agreement was reached between the representatives of Schering and Upsher-Smith on the payment of \$60 million in installments from Schering to Upsher-Smith, with the agreement contingent on the approval of the Schering Board of Directors, Thomas Lauda sent James Audibert's commercial assessment of Niacor-SR to Raman Kapur.*

Answer: Denied.

Request No. 38: *On June 17, 1997, Thomas Lauda had Mr. Audibert's commercial assessment faxed to Raman Kapur at approximately 9:31 am. Mr. Audibert had faxed an additional page of his assessment, a copy of which bears the document identification number SP 16 00036, to Mr. Kapur at approximately 10:22 am on June 17, 1997.*

Answer: Admitted upon information and belief.

Request No. 39: *On the morning of June 17, 1997, District Judge William H. Walls heard oral argument on Schering's and Upsher-Smith's motions for summary judgment in the Schering/Upsher-Smith patent litigation. The trial was scheduled to begin the next day, on June 18, 1997.*

Answer: Admitted in part and denied in part. Schering admits that the trial in the Schering/Upsher patent litigation was scheduled to begin on June 18, 1997. Schering denies that the summary judgment motion was argued on the morning of June 17, 1997, as the summary judgment argument occurred in the afternoon on June 17, 1997.

Respectfully submitted,



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Dated: August 6, 2001

CERTIFICATE OF SERVICE

I hereby certify that this 6th day of August, 2001, I caused an original, one paper copy and an electronic copy of the foregoing Respondent Schering-Plough Corporation's Objections and Responses to Complaint Counsel's First Request for Admissions to be filed with the Secretary of the Commission, and that two paper copies were served by hand upon:

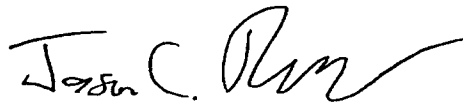
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